IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

H. E. CROOK COMPANY, INC., *Appellant*,
vs.
UNITED STATES

No. 122

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PETITION FOR REHEARING.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 122.—October Term, 1925.

H. E. Crook Company, Inc., Appellant, vs. The United States. } Appeal from the Court of Claims.

[January 25, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims, taken under § 242 of the Judicial Code before that section was repealed by the Act of February 13, 1925, c. 229, § 13; 43 Stat. 936, 941. The claim is for damages due to delay in enabling the plaintiff to perform a contract. The Court of Claims held that the plaintiff waived any claim that it might have had by going on with the work without protest and without taking any steps to protect itself. 59 C. Cl. 593. The Government contends that by the terms of the contract it was not bound to pay damages for delay.

The contract was that the plaintiff should furnish and install heating systems 'one in the Foundry Building, and one in the Machine Shop at the Navy Yard, Norfolk, Virginia.' It allowed two hundred days from the date of delivering a copy to the plaintiff for the work to be completed. A copy was delivered on August 31, 1917, making March 19, 1918, the day for completion. But it was obvious on the face of the contract that this date was provisional. The Government reserved the right to make changes and to interrupt the stipulated continuity of the work. *Wells Brothers Co.* v. *United States,* 254 U. S. 83, 86. The contract showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time. 'The approximate contract date of completion for the foundry' is stated to be March 17, 1918, and that for the machine shop, February 15, 1918. The same dates were fixed for completing the heating systems, but the heating apparatus had to conform to the structure, of course, so that if the general contractors were behindhand the heating

also would be delayed. They were behindhand nearly a year. When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied.

The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do. Delays by the building contractors were unavoidable from the point of view of both parties to the contract in suit. The plaintiff agreed to accept in full satisfaction for all work done under the contract the contract price, reduced by damages deducted for his delays and increased or reduced by the price of changes, as fixed by the Chief of the Bureau of Yards and Works. Nothing more is allowed for changes, as to which the Government is master. It would be strange if it were bound for more in respect of matters presumably beyond its control. The contract price, it is said in another clause, shall cover all expenses of every nature connected with the work to be done. Liability was excluded expressly for utilities that the Government promised to supply. We are of opinion that the failure to exclude the present claim was due to the fact that the whole frame of the contract was understood to shut it out, although in some cases the Government's lawyers have been more careful. *Wood* v. *United States*, 258 U. S. 120. The plaintiff's time was extended and it was paid the full contract price. In our opinion it is entitled to nothing more.

Judgment affirmed.

A true copy.

Test:

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PETITION FOR REHEARING.

Now comes H. E. Crook Company, Inc., Appellant, and respectfully prays the Court for a rehearing in this cause.

This rehearing is requested not only because of a firm conviction that the construction placed by the Court on the contract in suit is erroneous and does injustice to appellant, but because the decision fails to distinguish a long line of American decisions, both federal and state, as well as English decisions, giving a contrary interpretation to similar building contracts involving every element here present, and thus leaves the law of building contracts in uncertainty and confusion. In fact, it is believed impossible to distinguish this case in principle from an unbroken line of English

and American decisions running back nearly a century, and if this decision stands those authorities are at an end in our courts.

For the reasons stated, and particularly because of the far-reaching importance of the question involved, we earnestly request that a reargument be granted. In support hereof a brief of the authorities is attached.

Respectfully submitted,

BYNUM E. HINTON,
GEORGE M. BRADY,
Attorneys for Appellant.

BRIEF IN SUPPORT OF PETITION.

THE ISSUE AND THE DECISION

The contract, prepared by the government, obligated appellant with great strictness and under penalty to perform within a definite time. It was not permitted by the government to perform this obligation as required and was delayed more than a year. The suit is for the damages thereby occasioned. Appellant claims that the obligation which it was required to assume imposed on the government the corresponding duty of doing whatever was necessary on its part to enable appellant to comply with its contract. The decision concedes there was no express provision in the contract exempting the government from liability for such a claim, but holds that the whole frame of the contract was understood to shut it out.

ARGUMENT

The question presented, therefore, is whether the terms of this contract imposed upon the government the obligation to give appellant access to the site and afford it a fair and reasonable opportunity to perform within the stipulated time; or whether, as observed by an English justice, on a similar contract, Bush vs. Trustees of Whitehaven (infra), its language is such as to compel "such exceedingly oppressive and unreasonable construction" as to hold that the contractor had agreed that the whole incidence of the contract might be changed "at the sole will of the defendants and the whole onus of the contract altered, doubled, trebled, quadrupled, perhaps, upon the contractor."

The contract did not, as apparently assumed by the Court, reserve to the government any general right to suspend or interrupt the continuity of the work. It reserved only the right to make changes, or to annul in case of contractor's default, as will be hereinafter shown.

The Court cites in its opinion *Wells Brothers Co.* vs. *United States,* 254 U. S. 83, 86 (65 L. Ed. 148) and *Wood* vs. *United States,* 258 U. S. 120 (66 L. Ed. 495), the contracts in both of which contain specific provisions exempting the government from claims for damages occasioned by its delays. It admits, however, that no such specific exemption was inserted by the government in this contract, but attributes this in part to the carelessness of its lawyers. The more reasonable presumption is that such exemption was purposely omitted because it is well known that the insertion of such a drastic and unfair exemption will result in higher bids for the work. It would indeed be a most unprecedented rule of contract construction to permit the government to avoid this consequence of a positive exemption from liability and then permit its inclusion in the contract thereafter by interpretation on the ground that the government's lawyers were careless.

> "The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals." *Reading Steel Casting Co. vs. United States,* 268 U. S. 186, citing numerous decisions.

This contract was drawn by the government. Doubtful expressions in a contract should be con-

strued most strongly against the party who uses the language. *Garrison* vs. *United States,* 7 Wall. 688.

CONTRACT INVOLVED MUTUAL OBLIGATIONS

It is obvious from the terms of the contract that plaintiff's obligation to complete under penalty within a definite time required an expenditure of large sums of money in preparation to enable it to perform. and a continuous readiness to perform. In *United States* vs. *Speed,* 8 Wall 77, 84 (1869) this Court laid down the following rule with respect to the implication of mutual covenants:

> "Without entering into a discussion of the general doctrine of the implication of mutual covenants, we deem it sufficient to say that where, as in this case, the obligation of plaintiffs required an expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant."

English Authorities.

This rule has been uniformly applied by the English courts to building contracts like the one now in suit. Those courts have had occasion to apply to it such contracts where, as here, there were provisions for extensions of time and where other contractors were involved, and in every case, after reasoning the case out on principle, have held the owner liable in damages for his delays.

The following authorities are taken from the English work, Hudson on Building Contracts, 4th Edition:

Volume 1, p. 318:

> "In the absence of express conditions there is an implied contract that the employer shall be in a position to hand over the site to the contractor as soon as the agreement is entered into." Cases cited: *Yates vs. Law*, 25 Up. Can. Q. B. 562; *Freeman vs. Hensler*, Ct. App. Q. B. decided February 20, 1900 (full opinion Vol. II, p. 292, Hudson on Building Contracts); *Philadelphia Railway vs. Howard*, 13 How. 307; *Blanchard vs. Blackstone*, 102 Mass. 343.

In *Yates vs. Law, supra*, Y. contracted to do certain work on L.'s house by November 2d. L. let the stone work to other contractors. Y. was delayed by the stone work, and sued L. for extra cost thereby occasioned. L. pleaded that Y. knew the stone work was to be done by others and therefore L. did not undertake so to proceed with the stone work as to enable Y. to perform within the time agreed. Held that the plea showed no defense, as L. must be treated as having impliedly undertaken to do what was necessary to enable Y. to proceed with his contract, and that the fact of L. having employed others, against whom Y. could have no remedy, made no difference.

In *Freeman vs. Hensler, supra*, F. contracted with H. to pull down fifteen old buildings, and erect twelve shops on the site, within six months from the signing of the contract. H. did not give possession of any part until three weeks after the extended time for the completion of the whole works. Another part was handed over about two months later, and the remainder about three months later still. Held that there was an implied contract that H. should hand over the

land to F. to enable him to carry out what he had contracted to do, and that F. was entitled to damages caused by the increased cost of working.

Volume I, page 323:

> "The employer is responsible to the contractor for the due performance by other contractors of all works which he has agreed to perform. Thus, if performance of a contract to decorate a house within a given time is dependent on the completion of the plastering by another contractor (in the building owner's employ) the building owner will be liable in damages to the decorator for delay caused by the non-performance of the plastering;" citing illustrating cases.

In *Lawson vs. Wallasey Local Board* (1883), 48 L. T. 507 (cited Vol. I, 497), L. contracted to perform certain dredging operations for the Board and complete the same by an agreed date, subject to an extension of time, if certain staging on the site be not within a reasonable time removed. The staging was not so removed. Held that L. could recover as damages for the prevention of his operation, the cost of the extra employment on his plant and workmen.

Volume I, p. 536:

> "Extension of time does not release the employer from damages for breaches of contract by delay caused by him, unless the builder covenants to accept the extension in satisfaction of his claim for damages."

Kelly, C. B. in *Roberts vs. Bury Commissioners* (1870), L. R. 5 C. P. 310, said:

> "It is provided that it shall be lawful for the architect to grant an extension of time, but it is neither said that the architect must give it * * * nor that the contractor must accept whatever extension of time the architect is pleased to give, in full satisfaction of his claim for damages.
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> * * * * *
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> And where an engineer has discretionary power to direct within what time a building shall be completed, this does not give him power to suspend the work indefinitely: *Lake vs. Cameron* (1859), 10 Up. Can. Q. B. 622. See also *Bush vs. Whitehaven Trustees* (1888), Vol. II, p. 122."

In the matter of arbitration between *George Trollope and others,* K. B. Div., December 1, 1913, full opinion, Vol. I, p. 849, the Court had under consideration a claim against owner for damages under a contract providing for extensions of time, which were granted, and the Court held that this extension of time did not affect the damages claimed by the contractor against the employer for not affording possession of site. The Court said, p. 857:

> "Paragraph 18 is: 'It was contended on behalf of the employer that upon the true construction of the first contract the contractors were not entitled to any damages in respect of the delay in the completion of the same attributable to any of the causes enumerated in clause 25 of the same.' That is the principal point which Mr. Sankey has argued; that the power to extend time which is given in certain events by clause 25 has the consequence of precluding a claim for damages if there is an extension of time, that is to say, that the extension of time is to be deemed to be taken as satisfying all damage. Now, I cannot think that that is what it means. There appears to me to be no reason for putting that interpretation

upon it. The clause specifies a considerable number of events, in the happening of which the architect is empowered to extend the time, and he is not only empowered, but it says that he shall make in those events a fair and reasonable extension of time for completion in respect thereof. Now, I have to look at what those events are. They are events of at least, I think, three different characters. The first two are—force majeure and exceptionally inclement weather—matters which the contractor could make a grievance of, and could say, 'It really is not my fault that I have not done it, because there was force majeure, there was inclement weather.' He could make a grievance of those things, but if he had contracted to do the work in a particular time, he takes the risk of those matters according to our laws. Therefore, although he would have a sort of grievance, and might naturally request an extension of time, he would have no clear right to it. Then the clause goes on to a different class of things 'by reason of authorized extras or additions.' Authorized extras and additions are, of course (being authorized and being contemplated by the contract), no breach of contract, and it is not a breach of contract by the employer to order something extra, but it is a thing which if so done as to make it impracticable to complete the work in the contract time, prevents the contractor being bound by his obligation to complete in the contract time, and therefore a matter which it is obviously reasonable to provide for by an extension of time.

Then there is a third thing contemplated in this clause 25, and that is the breach of contract by the employer. I do not distinguish between breach of contract by him in person and by his agent. If such breaches are committed, and if they have the consequence of preventing the contractor completing his work in the contract time, they do not give him exactly an extension of time, but they free him from the consequences of not completing in

time; whether they are penalties or whatever they are. Therefore, that again is a matter which it is desirable to provide for by giving the architect power to extend the time. Therefore all the three classes of matters which are in clause 25 are all matters as to which it is desirable to give the architect the power of extending the time, and why is that a reason for depriving the contractor of his remedy in damages for one of these three, the only one which gives him the remedy in damages? I can see no reason whatever for doing it. There is ample reason for the clause, but there are no words in it which appear to me to have the effect contended for. If the delay affects the contractor not merely in the time he has to take in order to complete the whole work, but also affects him pecuniarily in the way of damages, why, because the time has been extended, the employer should not pay the damages I cannot see. It is a simple case, that by reason of the delays of giving the orders to go on with the work in some particular, this part of the work was idle, or the clerk of the works or somebody on the spot, whom the contractor has to pay, was idle. The extension of his time will prevent the contractor from having any difficulty about time, it will prevent his being liable for not doing the work by the contract date, and give him time to do it, but it will not put back into his pocket the damage which he has sustained by reason of having the men there idle and paying them. It seems to me that he has a right to have those damages, and therefore I must decide against that contention of the employer."

In *Bush vs. Trustees of Whitehaven*, Q. B. Div. (1888), reported in full Vol. II, p. 122, the contract there involved had many strict provisions against the contractor, and among others, that "the non-delivery in the manner aforesaid of the use of such site * * *

shall not vitiate or affect the contract * * * nor entitle the contractor to any increased allowance in respect of money, time or otherwise, unless the engineer may grant him an extension of time and then only to that extent." The contract provided for the completion of work within a fixed time. The owner failed to give the contractor access to the site until almost the whole of the agreed time had elapsed. Notwithstanding the provision quoted, the court, speaking through Lord Chief Justice Coleridge, held that the contractor could enforce a claim for damages caused him by the delay in giving access to the site. He said, p. 127:

> "I think therefore that upon the true construction of this contract we are not bound to arrive at any such exceedingly oppressive and unreasonable construction, and that a reasonable time—the giving of these sites within a time that shall be reasonable for the completion of the work—either within four months or within such further extension of time as the engineer shall have given—must be taken to have been the true view of the parties and that view being consistent with the words, it must be taken to be the true construction of the words which the parties have used."

He said that to construe the contract otherwise would be to hold that the contractor had agreed that the whole incidence of the contract might be changed "at the sole will of the defendants and the whole onus of the contract altered, doubled, trebled, quadrupled, perhaps, upon the contractor." He refused to so construe the contract. He quotes with approval from *Jackson vs. Union Marine Insurance Co.*, 8 Law. Reports, Common Pleas, 581, and other cases.

The case of *Freeman vs. Hensler* is reported in full, Vol. II, p. 292. This was before Smith, Collins and Romer, L. J. J., decided February 20, 1900. The opinion in this case is very much in point. In the course of his opinion Romer, L. J., said, p. 297:

> "When an owner of a site contracts with a builder that the builder shall, within a limited time under threat of penalty, build a shop on the site for the owner, and there is nothing else in the contract as to an opposite view, in my opinion it is implied that the owner is in a position to allow the builder forthwith to commence his work; in other words, it is implied in that contract that the land shall be delivered up to the builder forthwith, so that he may be able to commence at once * * *. There was a breach, for which he (contractor) is entitled to recover damages."

AMERICAN DECISIONS.

The first case on a building contract of the character now in suit came before the Court of Claims in 1896, *Kelly vs. United States,* 31 Ct. Clms. 361, 373, where the contractor had sustained damages by reason of the failure of the government to prepare a building site on which the plaintiff had agreed to erect a court house, and that Court, following the rule of the Speed supra case, held:

> "The claimants entered into the contract, agreeing to furnish all the labor and materials necessary and to complete the erection of the building within twenty-two months, and on the faith of the contract incurred expense and otherwise made the necessary arrangement to perform their contract, keeping themselves in readiness therefor, as required by the defendants.

This imposed upon the defendants the corresponding duty of doing whatever was necessary on their part to enable the claimants to comply with their contract. This is the rule as laid down in the case of the *United States vs. Speed* (8 Wall. 77, 84)."

The impelling necessity of such an implied obligation and the fundamental principles on which it is based is convincingly shown in the following opinion in *Allamon vs. The Mayor of Albany,* 43 Barb. 33, 35.

"*By the Court,* Miller, J. By the terms of the contract between the plaintiff and the defendants, for a breach of which a recovery was had in this action, no definite time was fixed for the completion of the plaintiff's work under it, but it contained a covenant by which the plaintiff was bound 'to commence said work and proceed therewith without delay, and in such manner as not to delay the contractor for the mason work.' It will be observed that here was a positive engagement on the part of the plaintiff as to the manner in which he was to proceed with the performance of the work he had agreed to do, and a direct promise and obligation on his part that he should commence at once and proceed without delay to its completion. If the plaintiff had failed to proceed with the work and fulfill this provision of the contract without delay, he would most certainly have been liable for any damages which may have accrued to the defendants, unless the delay was caused by the default of the defendants. This covenant in the contract was, to a considerable extent, for the advantage and benefit of the defendants, and contemplated a prompt and speedy performance of the work contracted for. The plaintiff, being thus bound by his agreement, commenced and proceeded with the job without delay, and was liable in damages for a non-performance

of the covenant, which obligated him to do so. The question arises whether there was not a corresponding obligation on the part of the defendants, implied from the contract itself, that they were to have the building upon which the work was to be executed, in readiness for the plaintiff, so as to enable him to commence and fulfill this provision of the contract. Was it a provision which bound the plaintiff alone, with no agreement whatever on the part of the defendants that they were to have the building in such a condition as to enable him to fulfill the contract? If it was thus confined in its character, it would be a contract merely on one side, with no corresponding obligation, no duty to be performed on the part of the other contracting party. There would be no mutuality in such a covenant, if thus limited in its operation and effect. While on the one hand the plaintiff would be bound to incur liabilities, expend money and make arrangements to complete the contract and perform its conditions, and thereby subject himself to large expenses and losses; on the other, the defendants would be free from all liability, entirely exonerated from all obligations, and permitted to remain quiet, without doing a single thing to enable the plaintiff to perform his contract.

Suppose the plaintiff had proceeded, as he had a right to do, and provided the materials necessary to perform the work, and the defendants failed to provide the building so that he could use them until they became depreciated in value, and caused serious loss to the plaintiff; can there be a doubt that the defendants would be liable? Again: suppose they had not provided any building whatsoever, so that the plaintiff was utterly unable to perform this condition, and was damaged greatly thereby; could they then be exonerated? If they had a right to delay three months, then they were equally authorized to delay for a year, or forever, and the plaintiff was without

any redress whatever. In such a view of the question, the contract was utterly void as to the defendants, while the plaintiff was bound to perform it, and was liable for any failure to do so.

I think the covenant on the part of the plaintiff, to commence the work and proceed therewith without delay, raised an implied obligation, on the part of the defendants, to have the building in readiness for the plaintiff to fulfill this condition. By entering into such a contract the defendants agreed that they would be prepared for its performance, and it is to be assumed that the very thing essential for that purpose constituted an element of the agreement. It was a mutual covenant, binding upon both the parties; on the part of the plaintiff, that he would commence and proceed at once; and on the part of the defendants, that they would be ready to allow him to do so. Without such a mutual contract neither party could be bound; the plaintiff might take his own time, and proceed at any time he deemed best, and the defendants were not bound to provide the building for the purpose of having the work done." It was held that the plaintiff was entitled to recover damages for said delays.

The opinion in the Crook case stresses the fact that there is no specific provision in the contract whereby the government bound itself to any fixed time for the completion of the work. A similar contract was under consideration in Mansfield vs. N. Y. C. & H. R. R. Co. 102 N. Y. 205, and a similar contention was made and sustained by the lower court in an action by the contractor for damages for the delays of the owner. The appellate court reversed the lower court, holding in this connection as follows:

"It seems to us that the court below has mistaken the plain reading and import of this con-

tract. It is true that there is no express provision in it requiring the foundations, or any part of them, to be ready at any particular time. So neither is there any such provisions requiring any foundations at all to be built by the owners; but the clearest implications arise from the language of the agreement, and its avowed object and intent, that the property of the owners upon which the building was to be erected should be prepared for the superstructure by such owners, and that the contractors should have notice whenever that time arrived. It was the indispensable condition to the performance of any of the obligations incurred by the contractors that the foundations should be prepared, and unless they were to be so prepared it rendered the whole contract motiveless and nugatory * * *

It is a well-settled principle of law in the construction of contracts that when the obligation of performance by one party presupposes the doing of some act on the part of the other, prior thereto, that the neglect or refusal to perform such act, not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or, when rescission will not afford him an adequate remedy, to continue the work, and recover such damages as the delinquency has occasioned against the defaulting party. *Cross v. Beard,* 26 N. Y., 88 * * *.

Looking at this contract in the light of decisions referred to, it would seem that the plainest principles of justice require the implication of a covenant on the part of the defendant to prepare the foundations in question so as to have them in a condition to enable the contractors to prosecute their work to the utmost advantage and economy before giving the notice which set the time limited for their completion in motion. Any other construction would destroy the mutuality of the agreement, and put it practically in the power of one party to defeat performance by the other.

It is quite obvious that the provisions of the contract in respect to time are of its essence, and were regarded by the parties as of primary importance; the contractors being stimulated to great diligence by the prospect of extraordinary compensation therefor, and deterred by the certainty of great pecuniary loss from dilatoriness or delay in the prosecution of their work. A construction which enabled the railroad company to retard the prosecution of the work by the contractors, or disabled them from employing all of the agencies or force which, in their judgment, could wisely and advantageously be used in its performance, would operate as a fraud upon them, and render their covenant to complete the work in five months a reckless and foolhardy undertaking. The very assumption of such a covenant on the part of the builders implies an understanding on the part of all parties that they were to be unrestricted in the employment of means to perform it and that nothing which it was the duty of the owner to do to enable the contractor to perform should be left undone. It is unreasonable to suppose that the parties intended to enter into obligations providing for the performance of work by one party, under a heavy penalty for non-performance within a given period, which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion."

While the contract showed that the buildings were then being erected under contract, it is not apparent why this situation should have suggested any concern to the contractor. It was expressly provided, paragraph 6 (R. 20): "Unless otherwise specifically stated, the contractor shall be allowed reasonable space at the site of the work and access to the same for receiving, handling, storing, and working material." The Court ignores this provision or treats it as mean-

ingless, as it does the provision, paragraph 8 (R. 20) that "the contractor shall commence work immediately." These provisions certainly have their place in any proper construction of the contract as a whole. Also, the government employed the general contractors and they were its agents, and it was responsible for their acts.

Furthermore, it is important to remember that when the government prepared the contract for appellant's signature, it knew the buildings were then under construction by the contractors and the approximate dates of completion. It also knew the extent to which the heating contractor's work had to conform to the main structure. With this situation before it the government saw fit to exact from the appellant a strict agreement, under penalty, to complete its heating contract by March 19, 1918, which was 34 days after the provisional date for completing the machine shop building and 2 days after the provisional date for completion of the foundry. In all fairness, therefore, we submit there was nothing in this situation to relieve the government from the usual implied obligation on its part that it would enable claimant to comply with its contract exacted under such circumstances. Neither was it unreasonable that the government should be willing to assume such an implied obligation in return for the agreement exacted by it from appellant. While it may have contemplated possible delays by the general contractors, it knew the terms of its contract with them and the control over or recourse to them given the government by such contract. It must have taken into account that in case the general contractors delayed the work it could exact damages from them. If it failed to protect itself against such a contingency,

it was an omission the consequence of which is certainly not chargeable to appellant. As very aptly expressed in this connection by the Court in *Nelson vs. Pickwick Associated Co.*, 30 Ill. App. 333:

> "Under a provision in the specifications with other contractors, whose work preceded that of the appellant, like that in the specifications for his work, the appellees had in their hands indemnity for the increase to the price of the appellant's work. If they did not have such a provision it was their own omission, the consequence of which is not chargeable to appellant.
>
> If the appellees desired exemption from their obligations under the contract, they should have put such exemptions in clear language that would have put appellant on his guard, and left no doubt as to what was intended."

The real situation and the soundness of our construction of the contract, is reflected in the following from opinion in *Cotton* vs. *United States*, 38 Ct. Clms. 536:

> "That there was delay in the dredge work that prevented plaintiffs from completing the wharves is beyond dispute. That it was unreasonable delay by the dredge contractors is evidenced by the fact that the defendant deducted from their pay upon the contract $16,150. That plaintiffs were not at fault in the delay of the completion of the wharves is evidenced by the fact that defendant extended from time to time the time of such completion, and when that was accomplished paid them in full, without deduction, the contract price, and this, too, without prejudice to this suit. In truth, from a consideration of the whole evidence it is indisputable that the reasons for the delay put upon plaintiffs was well understood

during the time of its occurrence and duration, and the officers of the defendant did all they could to lessen the worst effects of it. Part of the time covered by the delay so occasioned plaintiffs obtained and performed other work and received compensation therefor, and a portion of the time of their employees was also covered by employment, at less wages, however, than plaintiffs were obliged to pay them. Upon the findings we feel warranted in the conclusion that justice requires that defendant compensate the plaintiffs for the reasonable damages the latter have sustained in consequence of the delay in the prosecution of their work, caused by defendant's dredge contractors' failure to diligently prosecute their work. The right of this conclusion, it seems to me, is made more manifest by the fact that defendant has indemnified itself by deductions from the pay of the dredge contractors."

In *Stehlin-Miller-Henes Co. vs. City of Bridgeport* (Conn.), 117 Atlan. 811, the suit was by a heating and ventilating contractor against the owner for damages for delays caused by the general contractor, and the Court held as follows on p. 813:

"The rule is undoubted in circumstances such as were present in this case that an implied contract arose on the part of the defendant to keep the work on the building, whether done by itself or other contractors, in such a state of forwardness as would enable the plaintiff to complete its contracts within the time limited. *Allamon vs. Albany*, 43 Barb. (N. Y.) 33; *Mansfield vs. New York Central R. Co.*, 102 N. Y. 205; *Booth & Rogers Co. vs. Board of Commissioners*, 274 Fed. 659; *Tobey vs. Price*, 75 Ill. 645; *Hutt vs. Hickey*, 67 N. H. 411; 9 C. J. 715, note 66 (e)."

That courts have regularly imposed this implied obligation on the owner, not only for his own delays, but also for the delays of his contractors, where such delays prevented timely performance by the plaintiff contractor, is further shown by the following decisions:

In *Indianapolis N. T. Co., vs. Brennan* (Ind.), 87 N. E. 215, the delays of the owner railroad company were due to the delay in the construction of the road by another contractor, and the court held:

> "Certainly, when appellant company obligated these parties to do and finish the work within a fixed period, it was its duty to afford them a fair and reasonable opportunity to begin and complete the work; or, in other words, under the mutual contract entered into between it and them, it became its duty to furnish the required material, secure the right of way, and have the road grade in readiness, as required by the contract, so that appellees, in the exercise of reasonable diligence, might begin and finish the work within the prescribed period without being subjected to unreasonable cost or expenses on account of the default, delays and hindrance of appellant. Its default or failure in these respects would subject it to liability for whatever damages appellees might reasonably sustain on that account. If appellant violated or breached its contract, as alleged, by the defaults, delays, and hindrances charged against it, and thereby prevented appellees from beginning and completing the work which they had contracted to do, the law would hold it liable for the reasonable work or value of the work which they performed, and also for the loss sustained, if any, on account of their being prevented or not allowed by appellant to complete the work which they had undertaken to perform."

In *See vs. Partridge* (N. Y.), 2 Duer's Rep. 463, the delays complained of were due to other contractors and the Court held:

> "The plaintiffs were unconditionally bound to do the carpenter's work within a specified time. To accomplish this, they must not only provide the materials but employ the necessary hands. It was the legal duty of the defendant to keep the mason work in such a state of forwardness as to enable the plaintiffs to perform their contract. For the damages resulting from a clear breach of this duty he should be held liable."

The decisions are to the same effect on contracts providing time extensions for delays.

In *Robert Grace Contracting Company vs. Chesapeake & Ohio R. R. Co.* (C. C. A.), 281 Fed. 904, 907, it was held:

> "Nor will the extension of time which the engineer was to allow where there was delay by the railway company, and which was in fact given, serve to defeat, necessarily, all recovery claimed in the right of way branch of the case. It cannot be inferred that delay which threw the work over into the war period and enormously increased the cost of performance was intended to be neutralized merely by a corresponding extension of time."

In *Selden-Breck Construction Co. vs. Regents of U. of Mich.*, 274 Fed. 982, the contract provides that should the contractor be delayed in the prosecution of the work by reason of delays by other contractors, or through the owner, the time for completion should be extended for a period equivalent to the time lost. The Court held in this connection as follows at p. 984:

"The contention of defendant that this provision limits and measures the extent of the rights and remedy of the plaintiff in the event of delay occasioned through the fault of the defendant and deprives the plaintiff of the right to recover damages caused through such delay cannot, in my opinion, be sustained. In the absence of an express stipulation relieving the defendant from liablity for damages caused by its breach of this contract, it would, of course, be liable therefor. The language of the provision thus invoked and relied upon by defendant as a basis for exemption from such liability certainly does not in terms provide for such exemption, and to have that effect a meaning must be read into it which is not expressed in the words used. There seems to be no ambiguity in this language. It merely provides that if the plaintiff be delayed through the fault of any other contractor employed by the defendant, or through the defendant, 'the time of completion shall be extended for a period equivalent to the time lost.' The 'time of completion' is obviously the period of time referred to in the clause of the contract, copy of which is attached to the declaration, providing that the plaintiff 'is to complete the entire work upon or before January 1, 1918.' The purpose, then, of the condition invoked by defendant, is, manifestly, to relieve the plaintiff from the consequences of a failure on its part to complete its work by the date mentioned, if such failure be caused by the fault of the defendant, by allowing to the plaintiff an extension of the time of completion for a period 'equivalent to the time lost by reason of such fault of defendant.' That this was intended to be an allowance, and not a limitation upon, the plaintiff, is further indicated by the concluding clause in this section providing that such an 'allowance' will not 'be made' unless a claim therefor is presented within the time therein specified.

Although some authority is cited apparently to

the contrary I am unable to accept the reasoning or agree with the conclusion involved in the theory of the defendant in support of this contention. I am satisfied that the provision in question, properly construed, was intended to, and does, create an exemption in favor of the plaintiff, and not of the defendant, and that to interpret it otherwise would be to import into it a meaning which the parties thereto have not themselves expressed. *Nelson v. Pickwick Associated Co.,* 30 Ill. App. 333; *W. H. Stubbings Co. vs. World's Columbian Exposition Co.,* 110 Ill. App. 210; *Del Genovese vs. Third Avenue R. R. Co.,* 13 App. Div. 412, 43 N. Y. Supp. 8; Id., 162 N. Y. 614, 57 N. E. 1108."

In *William Cramp & Sons vs. United States,* 41 Ct. Clms. 164, the Court had under consideration a similar contract providing for extension of time and suit for damages for the government's delays, and it was contended by the government that the provision allowing the contractor additional time, afforded him the only relief against such delays. The Court denied this contention in the following opinion:

"The claimant could have completed the vessel within the time agreed upon but for the default of the Government; and to hold that the granting of additional time for such default precludes the claimant from the recovery of damages, if otherwise entitled thereto, would, it seems to us, be reading into the contract a provision not in the minds of the parties when the contract was entered into.

From the language of the ninth clause of the contract it is evident that what was in the minds of the parties was that if, through the fault of the claimant, the vessel was not completed within the contract time, then the penalties by way of

deduction from the contract price might be imposed; but if delayed by the fault of the Government, then additional equivalent time should be allowed, not in lieu of compensation for damages for such delay, but to enable the claimant to proceed to complete the vessel. But for that provision in the contract for additional time, the delay caused by the Government (the claimant having performed its part) would have discharged the claimant from further performance and left it with a right of action for damages on the obligation growing out of the breach. Or the claimant might have continued to perform, reserving to itself the right to sue for such damages as it may have sustained. On the other hand, as the claimant by the terms of the contract agreed that additional time should be allowed, equivalent to such delay, it thereby waived its right to terminate the contract for that cause; but the question of waiving its right to damages growing out of such delay was certainly not in the minds of the parties at the time the contract was entered into.

Nor was the granting of such additional time intended by the parties to operate as an estoppel against the claimant from seeking redress for damages it may have sustained by reason of the default of the Government. Certainty is an essential element in all estoppels, and the rule should not be applied unless the recitals in the contract are clear and conclusive against the claimant. Courts will not suffer a party to be deprived of a right without his consent, and such consent cannot be inferred from the mere granting of additional time without any fault on the part of the claimant.

The claimant being without fault in the delay, no penalty could have been imposed upon it without gross error akin to fraud, from which relief would have been granted by the courts. The granting of such additional time was clearly for the benefit of the Government, as it thereby pre-

vented the termination of the contract and saved it the expense of reletting the work to other contractors. Any other construction of the contract, it appears to us, might result in irreparable damage to the claimant, for if the Government is not to be held responsible in damages for its delay by reason of a corresponding extension of time, then it may delay the work indefinitely and exonerate itself by the mere granting of additional time in which to enable a contractor to complete his work.

But this objection, the defendants says, should have been considered by the claimant at the time of entering into the contract, and that if not satisfied therewith it could have declined to so contract. This would be true if the contract clearly so recited, or if the language used was susceptible of no other conclusion. We do not think the language used can be construed to exclude claims for damages arising out of such a breach; and if not, then the extension of time would not operate to deprive the claimant of its right to a recovery therefor.

Nor does the doctrine of *expressio unius est exclusio alterius* apply. That doctrine is not of universal application, and is always subject to the intention of the parties, evidenced by the contract.

It was not necessary to write into the contract that in case of breach the party injured should be entitled to redress for the damages thereby sustained. That right accrued when the default took place, and it would be no answer to say that because additional time is provided for in the contract therefore no breach occurred, for the extension of time is dependent upon a breach—that is to say, delay caused by the Government in the prosecution of the work.

On this branch of the case, therefore, we reach the conclusion that a corresponding extension of time for the delay caused by the Government was not intended by the parties to conclude the claim-

ant or deprive it of the right to maintain an action for any damages it may have sustained by reason of such delay."

This case was reversed by this court (206 U. S. 118), but on an entirely different ground. See in this connection *Cramp vs. U. S.* 216 U. S. 494, where a similar claim was allowed.

A similar contention was also made on the contract involved in *Kelly vs. United States,* 31 Ct. Clms. 361, supra, and the Court held as follows:

> "Therefore, to enable the claimants to complete the work under their contract within the time specified, and thereby avoid the forfeitures, they were to have one additional day thereto for every day they were delayed through any fault of the defendants.
>
> But this recompense, in respect to time, was not intended to be in lieu of damages which the claimants might suffer by reason of such delay, nor can the language be so construed.
>
> The provision is in the nature of an indemnity to the claimants against delay in the execution of their contract through any fault of the defendants."

A similar contention was made in the case of W. H. *Stubbings Co. vs. World's Col. Ex. Co.,* 110, Ill., App. 210, and denied by the Court. It was likewise made in *Nelson vs. Pickwick Associated Co.,* 30 Ill. App. 333, 336, and disposing of it the Court said:

> "The provisions for the extra time was for the avoidance of the penalty the appellant would incur if he did not complete his contract on time. In its language it purports a benefit to him; an allowance, not a deprivation, of his right to require the work to be in readiness for him."

NO GENERAL RIGHT OF SUSPENSION RESERVED TO THE GOVERNMENT

The Court's opinion apparently proceeds on the assumption that the contract reserved to the government a general right to suspend or interrupt the coninuity of the work. This is in error. There was only reserved the right to make changes, paragraph 17 (R. 23) or to annul the contract, paragraph 16 (R. 22). The contractor was not concerned with the latter, as it was conditioned on its default. Neither was it concerned with the former, because in the very paragraph making the reservation, specific provision was made for appropriate readjustment of the contract price. For changes by additions prolonging the contract time, the contractor would be paid his "estimated actual cost" thereby occasioned. This carried with it full compensation for any such reasonable delays, as well as the extra work involved in such a change. Of course "nothing more is allowed for changes." The Court says it would be strange if the government were bound for "more" in respect of matters presumably beyond its control. We are not asking that it be held for "more" for other delays, but merely that it be allowed the same, that is, for the "actual cost" thereby occasioned.

While paragraph 8 (R. 20) provided that "the contractor shall commence work immediately after delivery to him of copy of the contract, and continue without interruption unless otherwise directed by the government," it is obvious that the last phrase refers only to such interruptions as the government had elsewhere properly reserved the right to make, namely, to make changes or to annul in case of contractor's de-

fault. A general right of suspension or stoppage of the work with exemption from liability therefor, would be a drastic provision and carry with it the power to greatly damage and possibly ruin the contractor and leave him without recourse. Such a power surely should not be presumed from general terms, but should be reserved in direct and positive provisions, the purport of which could not be misconstrued by the other party to the contract. Nelson v. Pickwick Associated Co. supra.

The government not having reserved to itself any general right of suspension, it is difficult to see why this case does not come within the authority of *United States vs. Smith,* 94 U. S. 214, which has been frequently cited by the Court of Claims as its authority in these cases. In that case the Court held:

> "The only questions presented in this case relate to the liability of the United States for damages growing out of the suspension of the work under the contract sued upon. In effect, the contract bound Smith to furnish the materials and erect the buildings, the labor being performed by the soldiers at the Fort, except to the extent that skilled workmen were necessary. There was no time specified within which the work must be done, neither was there any power reserved by the United States to direct its suspension. Under such circumstances, the law implies that the work should be done within a reasonable time, and that the United States would not unnecessarily interfere to prevent this."

While there was a positive order of suspension in that case, and mere inaction in the instant case, that difference is not material. In *Blanchard vs. Black-*

stone, 102 Mass. 343, the plaintiff sued on a written contract to build a lock-up for the town, and averred that he was ready to perform his contract, but that the defendants hindered him. The Court held:

> "The agreement did not fix the spot on which the building was to be erected. It was therefore the duty of the town to furnish a place. If the town unreasonably omitted to perform this duty, it was as much a hindering and preventing of the performance of the agreement by the plaintiff, as if the town had expressly refused to select the place, or had done any other affirmative act to interrupt his performance of the agreement."

GOVERNMENT'S ACTS NOT TO BE REGARDED AS UNAVOIDABLE AS TO GOVERNMENT ITSELF

The Court observes that the provision that acts caused by the government will be regarded as unavoidable (paragraph 14, R. 21), which though probably inserted primarily for the contractor's benefit as a ground for extension of time, "is not without a bearing on what the contract bound the government to do." It is not believed that the Court attaches much importance to this inference, or will adhere to it upon full consideration. It will be observed that this clause is found in the "General Provisions" which were incorporated in the contract by reference (R. 5), and bears date August 1, 1916, more than a year preceding the date of this contract, August 14, 1917, and the term, "General Provisions," shows that they are prepared for insertion in bureau contracts generally. The language therefore must be construed, as intended, to make it applicable to contracts generally. Furthermore,

the connection in which it is used makes its meaning perfectly clear. It is used in a paragraph headed "Unavoidable Delays," which are obviously being defined for the sole purpose of extensions of time. The opening sentence is "Unavoidable delays are such as result from causes which are *beyond the control of the contractor.*" The delays are then enumerated, including delays due to the acts of the government; obviously meaning merely that the delays of the government are to be regarded as unavoidable for the purpose of time extension, because *beyond the control of the contractor.* The government obviously controls its own acts, and it is unreasonable to impute to the government an intention to have the contractor agree that all of its acts are to be regarded as unavoidable for all purposes. As was said by Lord Escher, Master of the Rolls, in *Dodd vs. Churton,* I Q. B. 562:

> "One rule of construction with regard to contracts is that when the terms of a contract are ambiguous and one construction would lead to an unreasonable result, the court will be unwilling to adopt that construction."

OTHER CLAUSES OF CONTRACT EXAMINED.

While plaintiff agreed to accept in full satisfaction for all work done under the contract the contract price reduced by damages deducted for his delays and increased or reduced by the price determined for changes, and that the contract price should cover all expenses of every nature connected with the work to be done, it is obvious that each of these clauses was intended to be restricted to the particular connection in which used. Paragraph 13 (R. 21) defines liquidated

damages for the contractor's delay and has the contractor agree and consent "that the contract price, reduced by the aggregate damages so deducted, shall be accepted in full satisfaction for all work done under the contract." The meaning of this language must necessarily be restricted to paragraph 13, because it would otherwise be inconsistent with paragraph 17 (R. 21) on changes. Paragraph 17 has the contractor agree and consent "that the contract price thus increased or decreased shall be accepted in full satisfaction for all work done under the contract." This meaning must likewise be restricted to this particular paragraph, as otherwise it would be inconsistent with the language in paragraph 13. Paragraph 18 (R. 23) providing that "the contract price shall cover all expense, of whatever nature or description, connected with the work to be done under the contract," obviously has no other purpose than to provide against unjustifiable claims for extra work.

Since the meaning of each of these clauses when considered separately is clearly intended to extend only to the subject of the particular paragraph in which used, they cannot merely by being considered collectively be construed to include something not included or contemplated in either, namely, to shut out claims for damages for breach of contract by the government.

The government drew this contract, and if it desired exemption from such liability it should have so provided in specific terms, as was done in *Wells Brothers C. vs. U. S.* and *Wood vs. U. S., supra.* Not having done so, it should not be read into the contract by a strained construction of clauses inserted for other specific purposes.

When this contract was drawn in 1917 the parties could not have understood that its general frame excluded claims for the government's delay and made a specific exemption clause unnecessary. The law was then to the contrary. See practically identical case in Sanborn vs. United States, 47 Ct. Clms, 254, 281 (1911).

CONCLUSION

The foregoing shows an unbroken line of English and American decisions running back nearly a hundred years, holding that when a contract obligates a contractor under penalty to complete a work within a definite time, and this obligation requires the contractor to expend money in preparation to perform and to continue in readiness to perform, that such obligation imposes upon the owner the corresponding duty of doing whatever is necessary on his part to enable the contractor to comply with his contract, and renders the owner liable in damages for breach of this duty; and further that the situation is not changed by contract provisions for extension of time, or where it appears that there are other contractors, employed by the owner, whose work must precede that of the plaintiff. It was in reliance upon this long line of well reasoned authorities that the Court of Claims held in *H. E. Crook Co. vs. United States*, 59 Ct. Clm. 348, involving a similar claim:

> "The law governing such cases is well established, and has been repeatedly asserted by this Court and by the Supreme Court of the United States," and citing cases.

We respectfully submit that there is nothing in this contract to distinguish it in principle from this line of authorities; and if the doctrine of implication of mutual covenants announced in the Speed Case, *supra*, and so unqualifiedly and uniformly affirmed and reaffirmed in both English and American cases is sound, the decision in this case should be reversed.

Neither will it be easy in the future for courts to

distinguish *any* such cases from the Crook case, if this decision is allowed to stand. This decision, in other words, will for all practical purposes overrule the foregoing long line of authorities on building contract law and render them without effect so far as our courts are concerned. The Court of Claims has already interpreted the Crook decision as authority for dismissing cases where the acts complained of were the acts of the government itself and not of other contractors. See *Lange & Bergstrom vs. United States,* C-930 and C-931, and *Converse & Co. vs. United States,* C-1202, both decided February 15, 1926. Also see *Walter D. Lovell vs. United States,* B-306, decided February 23, 1926.

Inasmuch as this Court made no reference to the foregoing line of authorities, but confined its opinion to the language of the contract itself, it is not believed that the Court intended in this decision to announce a new principle of building contract law. We do believe, however, that the Court will be convinced on reconsideration that if the opinion is allowed to stand it must have that effect; and that this court will not be willing in this indirect manner to strike down such a line of authorities. It is respectfully submitted, therefore, that a rehearing should be granted.

Respectfully submitted,

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